THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Edward B. Cottingham, Circuit Court Judge

Case No. 2013-000197

The State, Respondent,

v.

Marquis T. Evans Appellant.

FINAL BRIEF OF APPELLANT

Russell W. Mace III
The Mace Firm
1341 44th Ave. N., Ste. 205
Myrtle Beach, S.C. 29577
(843) 839-2900
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES

STATEMENT OF ISSUES

Marquis T. Evans submits his initial brief on the following issue(s):

1. The trial court erred when it denied Evans' motion for a directed verdict based on an insufficiency of the evidence when the State failed to present any substantial evidence that Evans had knowledge the property was stolen.

2. The trial court erred by admitting improper hearsay testimony through Dayne Dukes, causing unfair prejudice to the appellant.

3. The trial court erred when it denied Evans' motion for a new trial based on an insufficiency of the evidence when the State failed to present any substantial evidence that Evans had knowledge the property was stolen.

4. The trial court erred when it charged the jury with a reasonable person standard for the knowledge element of receiving stolen goods.

STATEMENT OF THE CASE

Marquis T. Evans was the defendant in the Court of General Sessions for the Fifteenth Judicial Circuit in Horry County, South Carolina and will be referred to by name or as the appellant. The respondent, The State of South Carolina, will be referred to as the State.

An indictment charged that Evans did knowingly receive stolen goods, value of $2,000 to $10,000 in violation of S.C. Code Ann. § 16-13-180. A jury trial was held on January 10, 2013 and the jury, on the charge of receiving stolen goods, found Evans guilty. (R. 161, lines 16–20.) Evans was sentenced to a term of three years imprisonment. (R. 167, lines 8–10.) Evans filed a timely Notice of Appeal on January 16, 2013 and received by this Court on January 22, 2013. This appeal follows.

STATEMENT OF FACTS

An indictment was returned against Evans for receiving stolen goods, value $2,000 to $10,000. (R. 8, lines 1-3) A jury trial was held on January 10, 2013.

Jury Trial:

Dayne Dukes ("Dukes"), testified that that he resided in Florida, and that he was a security agent working for Airgas throughout the country. (R. 37, lines 14-25; R. 38, lines 1-3). However, he did not work at the facility in Wilson, so he could not personally testify that the property recovered was stolen property. He testified that when he became involved in the investigation, he "contacted the Wilson Police Department, obtained a copy of the police report and the inventory that was listed as being removed during the break-in" at Airgas National Welders in Wilson, North Carolina. (R. 40, lines 6-14). Based on this information he received from other sources, he testified that a burglary occurred sometime on June 24, 2011 at an Airgas National Welders facility in Wilson, North Carolina. (R. 42, lines 24-25) He also testified that approximately $13,000.00 in assets were removed from the facility, however, he was not present during the alleged burglary and was not an employee of the Wilson, North Carolina Airgas National Welders Facility. (R. 43, lines 6-8) In an attempt to locate the property, he and a forensic auditor searched Craig's List. (R. 44, lines 10-12) They found an advertisement posted in Norfolk, Virginia on June 26, 2011 for equipment similar to that stolen

from the facility. (R. 45, lines 21-25) This posting was not discovered until July 4, 2011. (R. 48, lines 16-19) The advertisement instructed interested persons to contact "Matt" at (919) 349-1916. (R. 49, lines 7-13) When Dukes attempted to make contact with "Matt" via email, the posting had been shut down. (*Id.*) Dukes indicated that these items were being sold for less than the wholesale value. (R. 50, lines 18-22)

After the initial contact failed, a colleague informed Dukes that a similar advertisement had been posted on Craig's List in Myrtle Beach, South Carolina. (R. 52, lines 12-13) Dukes contacted the advertisement via email. (R. 55, lines 16-19) He received a phone call shortly after from the same number on the Virginia advertisement. (R. 56, line 25) The caller indicated that his name was Danny Miller and that he was willing to meet on July 13, 2011 to discuss the sale of the goods. (R. 58, lines 1-3) There was not witness from a telephone company that testified that the number listed was for Marquis Evans.

After speaking with "Danny," Dukes and several others arranged to meet at the Horry County Police Department. (R. 62, lines 4-7) Captain Dale Buchanan ("Buchanan") agreed to meet with "Danny" at Big lots parking lot. (R. 64, lines 11-16) Buchanan identified Evans as the individual he met in the parking lot. (R. 118, line 18) Once Evans opened the vehicle to get the equipment, the officers surrounded him. (R. 118, lines 18-25) Buchanan acknowledged that Evans was

fully cooperative at that time and made no attempt to flee. (R. 125, lines 6-7) Both Dukes and Detective Michael Kathma, a member of the property crimes unit for the Horry County Police Department, stated that Evans gave consent to search the vehicle and was cooperative with the investigation. (R. 105, lines 8-9) Buchanan was not involved in any further investigations with the property.

Dukes testified that the serial numbers on the equipment found in Evans' vehicle had been removed. (R. 71, lines 4-5) However, according to Dukes, the team located one serial number on one of the pieces of equipment and it matched a machine stolen from the Wilson facility. (R. 71, lines 10-15) Dukes stated that the equipment retrieved from Evans' vehicle was worth approximately $5,000.00. (R. 71, lines 10-15) At no point during the trial was the thief involved in the Wilson facility burglary identified. It should be noted that defense counsel made several objections to Dukes' testimony on the basis of hearsay because Dukes, on more than one occasion, testified as to what other persons had told him regarding the investigation. (R. 60, lines 16-18) In fact, Dukes utilized a report prepared by an individual named Jonathan Rabon of the Horry County Police Department in identifying the lone matching serial number and piece of equipment. (R. 82–85.) He had no personal knowledge of the matching serial number. (R. 78, lines 5-9)

After the State concluded its case in chief, defense counsel moved for a directed verdict of not guilty alleging that the evidence was insufficient to support

the charge of receiving stolen goods. (R. 127, lines 9-19) Specifically, defense counsel stated that the State failed to show that Evans knew or should have known that these items were stolen. (*Id.*) The trial court denied the motion stating the following:

> I would respectfully disagree with you in that there is testimony that this Defendant had in his possession numerous recently stolen items identified by product number. As to one specific item, it was identified by the exact number on the plates. There is an additional inference that the jury well may derive and that is that there is testimony that some of this stuff was still in its original packaging indicating it was brand new. Obviously, we know that brand new merchandise is generally not sold. I would think there is an inference to be derived by the jury—it is a circumstantial evidence case and I'll charge circumstantial evidence but I would respectfully deny your motion and think it's a question for the jury.

(R. 128, lines 5-17) The jury returned a verdict of guilty. (R. 161, lines 16-19) At that time, defense counsel moved for a new trial, again, based on an insufficiency of the evidence. (R. 164, lines 15-21) The trial court denied the motion. (R. 165, line 16) However, the trial court acknowledged that "the jury could've easily found him not guilty based on the evidence in the case." (R. 166, lines 11–12) Evans was sentenced to three years imprisonment. (R. 167, lines 8–10)

Jury Charge:

The pertinent portion of the jury charge was read as follows:

> The Defendant is charged with receiving stolen goods. The State must prove beyond a reasonable doubt that the Defendant bought, received or possessed goods, chattels or other property and that the Defendant knew or had reason to believe that the property was stolen. Whether the Defendant knew or had reason to believe that the property was stolen may be shown by direct or circumstantial evidence. The State may prove that the Defendant knew or had reason to believe that the property was stolen by showing that the Defendant knew facts that would make a reasonable person believe that the property was stolen.

(R. 138, lines 2–12)

ARGUMENTS

Standard of Review:

In criminal cases, this court reviews errors of law and is bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Rulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion. *State v. Stokes*, 381 S.C. 390, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009).

When considering a motion for a directed verdict, the trial court must consider the existence or non-existence of evidence, not its weight. *State v. Fennell*, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000). The trial court should grant the motion where the evidence merely raises a suspicion that the accused is guilty. *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984). However, the case should be submitted to the jury if there is any direct or substantial circumstantial evidence that reasonably tends to prove the guilt of the accused. *Fennell*, 340 S.C. at 270, 531 S.E.2d at 514.

Whether to grant or refuse a motion for new trial is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Prince*, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993).

I. The trial court erred in denying Evans' motion for directed verdict on the ground that there was insufficient evidence that Evans had knowledge that the property was stolen.

It is uncontested that Marquis Evans was arrested with some property. No evidence, other than hearsay, was presented that this property was stolen. Additionally, the State did not present evidence that Evans knew the property was stolen. Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Here, the evidence against Evans was insufficient to sustain a conviction for receiving stolen goods in violation of S.C. Code Ann. § 16-13-180. The statute explicitly states as follows:

> It is unlawful for a person to buy, receive, or possess stolen goods, chattels, or other property if the person *knows or has reason to believe the goods, chattels, or property is stolen.* A person is guilty of this offense whether or not anyone is convicted of the theft of the property.

S.C. Code Ann. § 16-13-180(A) (emphasis added). "Knowledge of the theft, on the part of the receiver, is an essential element of the offense of receiving stolen goods, which knowledge must exist at the moment the property is received." *State v. Rountree*, 80 S.C. 387, 61 S.E. 1072, 1073 (1908). "[F]acts sufficient to put a reasonably prudent man on inquiry are not sufficient" to sustain a conviction

for receiving stolen goods. *State v. Mills*, 225 S.C. 151, 153, 81 S.E.2d 285, 286 (1954) (*State v. White*, 211 S.C. 276, 279, 44 S.E.2d 741, 742 (1947)). Thus, in order to sustain a conviction for such an offense, the State must prove beyond a reasonable doubt the essential element that the defendant had knowledge or reason to believe the goods were stolen at the moment he received the goods. *See id.*

The evidence relied upon by the State to prove Evans' knowledge was entirely circumstantial. The State only presented the following evidence:

(1) That a Craig's List advertisement was posted shortly after the burglary and the descriptions allegedly matched various stolen property from the Wilson facility;

(2) That the property was being sold at less than wholesale value;

(3) That some of the serial numbers were missing from the property located in Evans' vehicle;

(4) That one serial number matched a piece of equipment from the Wilson facility; and

(5) That some of the property was in its original packaging.

This evidence is insufficient to show that Evans had knowledge that the goods were stolen. First, selling property at less than wholesale value on Craig's List is not uncommon. (R. 91, lines 4-8) Second, there was no testimony that property with missing serial numbers necessarily implies that a person in possession of those goods would undoubtedly know they were stolen. Third, the property was in its original packaging, this fact does not clearly establish knowledge that the goods

were stolen. Fourth, testimony from Dukes regarding the matching serial number was an improper admission of hearsay testimony. (R. 84, lines 14-17) Finally, evidence was presented that Evans was completely cooperative with the investigation, did not attempt to flee, and consented to a search of the vehicle. (R. 88, lines 7-9; R. 105, lines 8-12) Such conduct is inconsistent with an individual that is aware that property in his or her possession is stolen.

The State failed to present any evidence concerning the circumstances under which Evans was transferred possession of the property. Rather, the State's reliance on the above facts can only be viewed as an attempt to imply Evans stole the property, and not merely that he knew the goods were stolen by a third party. *See State v. McNeil*, 314 S.C. 473, 475–76, 445 S.E.2d 461, 462 (Ct. App. 1994) (stating that a conviction for receiving stolen goods requires receipt of the goods by someone other than the person who actually stole them). At most, the evidence was only capable of raising a mere suspicion that Evans was guilty of receiving stolen goods. *See Schrock*, 283 S.C. at 132, 322 S.E.2d at 452. The State did not present any direct evidence of Evans' knowledge. It also did not present substantial circumstantial evidence proving Evans had actual knowledge that the property was stolen or had reason to believe it was stolen. In fact, the trial court admitted that "the jury could've easily found him not guilty based on the evidence in the case." (R. 166, lines 11–12.) The trial court's statement establishes that the

evidence in this case, at the most, only raised a suspicion of guilt. "If the evidence is consistent with both innocence and guilt it cannot support a conviction." *United States v. Varoz*, 740 F.2d 772, 775 (10th Cir. 1984).

The only testimony heard was the fact that Dukes worked for a private company hired by the alleged victims of a robbery in North Carolina, no one testified that they owned the property recovered from Marquis Evans or that the property recovered from him was the property that was stolen. The State failed to present any witnesses that could identify the property and testify that it was in fact stolen because no witnesses from Airgas Welders in Wilson, North Carolina, the company that reported the property stolen, testified at trial. Dukes testified that that he resided in Florida, and that he was a security agent working for Airgas throughout the country. (R. 37, lines 14-25; R. 38, lines 1-3) However, he did not work at the facility in Wilson, so he could not personally testify that the property recovered was stolen property. He testified that when he became involved in the investigation, he "contacted the Wilson Police Department, obtained a copy of the police report and the inventory that was listed as being removed during the break-in" at Airgas National Welders in Wilson, North Carolina. (R. 40, lines 6-14) As a result, he did not have any firsthand knowledge of the stolen knowledge and his testimony regarding the identification of it was hearsay.

For these reasons, this Court should reverse the trial court's denial of Evans' motion for directed verdict.

II. The admission of hearsay evidence unfairly prejudiced Evans and constitutes reversible error.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. *See* Rule 801(c), SCRE; *State v. Brown,* 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. *See* Rule 802, SCRE; *State v. Lewis,* 293 S.C. 107, 110, 359 S.E.2d 66, 67 (1987). No exception to the hearsay rule applies to the facts in this case. Throughout Dukes' testimony, the State introduced hearsay evidence over the objection of defense counsel. For example, Dukes was allowed to testify about a police report he did not generate over the objection of defense counsel. (R. 40, lines 17-25; R. 41, lines 1-25). Dukes did not track the telephone number on Craig's List to Evans, another person allegedly did so who did not testify. However, Dukes testified that the number was tracked to Evans over the objection of defense counsel, even though this was clearly hearsay. (R. 60, lines 10-25)

Dukes testified that the only piece of equipment matching the serial number of the stolen property was a Caddy MIG welder, but he relied on a report generated by Jonathan Rabon, an employee of the Horry County Police Department, when giving this testimony. (R. 82, line 2). This testimony was hearsay. Rabon did not

testify at the trial. Dukes testified that he was present when law enforcement officers identified the equipment, so the court allowed him to testify regarding the serial numbers over the objection of defense counsel, despite the fact that he did not generate the report he was relying on in court. (R. 70, lines 4-18; R. 82, lines 2-20) As a result, Dukes had no personal knowledge of the matching serial number until he retrieved a report drafted by Jonathan Rabon, an employee of the Horry County Police Department. (R. 77–78, 82, lines 2-6; R. 84, lines 7-19) Additionally, defense counsel informed the court that he did not receive the report in discovery. (R. 83, lines 19-20) The State argued that the report was listed in the evidence log provided in discovery, and the court simply accepted the state's position, finding that the report was admissible, even if defense counsel never received it. (R. 83, lines 5-25; R. 84, lines 1-5) Lastly, pictures were introduced by the State through Dukes, even though he did not take the pictures, did not authenticate the pictures and admitted he was not involved in taking the photographs. (R. 84, lines 14-19)

Improper admission of hearsay testimony constitutes reversible error when the admission causes prejudice. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Dukes' testimony was the only evidence that there was a piece of equipment that matched something stolen from the Wilson facility. The jury was not given the opportunity to hear testimony from Jonathan Rabon, the individual

who actually prepared the report, to determine his credibility. Since this testimony was introduced by the State in order to prove Evans had knowledge that the goods were stolen, it was substantial and likely affected the result of this trial. *See State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (A conviction will generally not be set aside where error of the trial court was insubstantial and does not affect the result of the trial). Dukes even admitted during cross examination that he was merely present at the police department in Horry County when the inventory was done and admitted "*they* [Horry county law enforcement officers] went through all the equipment and made notations of what serial numbers *they* could find." (R. 85, lines 10-20) As a result, it is clear that Dukes did not participate in identifying the alleged stolen property; this was handled by the police department. The admission of this hearsay evidence was improper and caused unfair prejudice to Evans; therefore, his conviction should be reversed.

III. The trial court erred in denying Evans' motion to set aside the verdict and for a new trial on the ground that there was insufficient evidence that Evans had knowledge the property was stolen.

The trial court lacked the evidentiary support to deny Evans' motion for a new trial for the reasons previously discussed above in Section I of the Argument. Therefore, the trial court abused its discretion in denying Evans' motion and its judgment should be reversed.

IV. The trial court erred in charging the jury that a reasonable person standard was sufficient to prove knowledge for the charge of receiving stolen goods.

The trial court charged the jury with a reasonable person standard for receiving stolen goods:

> The State may prove that the Defendant knew or had reason to believe that the property was stolen by showing that *the Defendant knew facts that would make a* ***reasonable person believe*** *that the property was stolen.*

(R. 138, lines 8–12) (emphasis added.) The Supreme Court stated in *State v. Hamilton*, 166 S.C. 274, 164 S.E. 639, 640 (1932):

> [W]e do not understand that the rule of law of force goes so far as to authorize a conviction on such charge simply because the person receives the goods under such circumstances that a person of ordinary reason, judgment, and prudence would know that they were stolen. Under an indictment charging a person with receiving stolen goods, knowing them to have been stolen, it is not a question of what effect the circumstances under which the goods were received would have upon the mind of a person of ordinary reason, judgment, and prudence, but the question to be answered is, What effect did such circumstances have upon the mind of the person receiving the goods?

The Supreme Court, in line with this reasoning, has consistently held that such a charge constitutes reversible error. *Hamilton*, 166 S.C. at 274, 164 S.E. at 640 (reversing conviction for charge that stated "if the circumstances and [defendant's] actions would indicate to a person of ordinary reason and judgment and prudence that they were stolen, then that would be sufficient to say that the person who

received them had knowledge they were stolen."); *Mills*, 225 S.C. at 152–53, 81 S.E.2d at 286–87 (reversing conviction for charge that State may show guilt beyond a reasonable doubt, "by evidence tending to show that the goods were stolen upon inquiry or to arouse such suspicion as would put an ordinary person on inquiry."); *Rountree*, 80 S.C. at 387, 61 S.E. at 1073 (reversing conviction for charge regarding failure to pursue an inquiry with reasonable diligence).

By charging that the State could prove guilt by presenting evidence which would convince a reasonable person that the property was stolen, the jury's only duty on the question of guilty knowledge was to decide what a reasonable person would have done or known under the circumstances. This was equivalent to advising the jury that, if it concluded such a reasonable person would have been satisfied the property was stolen, the law would attribute the same knowledge to Evans. It relieved the jury of the necessity of considering whether the circumstances under which the defendant received the property were such as to cause *him* to realize *individually* that it was stolen, and permitted his conviction upon the jury's determination of what a reasonable person would have done or known under the circumstances. The question for the jury was not whether the facts would have given the ordinary person knowledge of the theft, but whether they had such effect upon the defendant himself with his understanding of their significance. *See Hamilton*, 166 S.C. at 274, 164 S.E. at 640.

Furthermore, a "reasonable man" approach attempts to integrate a civil negligence standard into criminal law, lessening the State's burden of proving guilt beyond a reasonable doubt. *See Rountree*, 80 S.C. at 387, 61 S.E. at 1073 (noting that the reasonably prudent man standard, while applicable in civil litigation, is irrelevant to receiving stolen goods). Each defendant should be judged according to his *own* mental state in these types of cases. Many people are not as cautious and prudent as the reasonable person. The circumstances might have meant knowledge to the reasonable person, and nothing to Evans.

For these reasons, the trial court's reference to a reasonable person standard in its jury instruction likely misled the jury and greatly shifted the State's burden of proof. This undoubtedly had a prejudicial effect on Evans. Therefore, this Court should remand this case for a new trial.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Appellant, Marquis T. Evans, respectfully requests that this Court reverse his conviction.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision making process.

Respectfully Submitted,

By: 

Attorney for Appellant
Russell W. Mace III
The Mace Firm
1341 44th Ave. N., Ste. 205
Myrtle Beach, SC 29577
(843) 839-2900

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Russell W. Mace III
The Mace Firm
1341 44th Avenue North, Suite 205
Myrtle Beach, SC 29577
843.839.2900 Telephone
843.839.2913 Fax

Attorney for Appellant